IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 28, 2006 Session

DR. MARCEL ELUHU, ET AL. v. WALTER RICHARDS, ET AL.

Appeal from the Chancery Court for Davidson County
No. 02-255-I Claudia Bonnyman, Chancellor

No. M2005-00922-COA-R3-CV - Filed on June 2, 2006

This is an appeal contesting proper service of process after a default judgment was entered against Defendant. Defendant first appeared and raised the issue of ineffective service of process in a Rule 60.02 motion after Plaintiffs attempted to execute on the judgment. After a hearing, the court denied Defendant's motion determining that Defendant's attorney had the authority to accept service on his behalf and Defendant had otherwise failed to carry his burden to show that service was ineffective. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and JERRY SCOTT, SR.J., joined.

Mark A. Baugh and Helen F. Bean, Nashville, Tennessee, for the appellant, Tony Cebrun.

Winston S. Evans, Nashville, Tennessee, for the appellees, Dr. Marcel Eluhu and Shirley Hardy Cole, Executrix of the Estate of Dr. Robert E. Hardy.

OPINION

Drs. Marcel Eluhu and Robert Hardy were providers for Tennessee Coordinated Care Network ("TCCN"). In reliance on alleged misrepresentations made by Anthony Cebrun, Drs. Eluhu and Hardy, invested in Medical Care Investors ("MCI"), an investment group formed to provide monies to purchase assets of TCCN. MCI owned an interest in Medical Care Management Company ("MCMC"). Mr. Cebrun served as President, Director, and Chairman of MCMC while Walter Richards served as President of MCI. Mr. Cebrun also served as President of Access Health Systems ("AHS"), the parent company of MCMC, and Mr. Richards served as Chief Financial Officer. In December 2001, AHS filed for bankruptcy.

On December 17 and 20, 2001, Dr. Eluhu's attorney sent letters of intent to sue to Messrs. Cebrun and Richards asserting that Drs. Eluhu and Hardy believed that they had been defrauded into

making the investment with MCI. On January 24, 2002, Dr. Eluhu and Dr Hardy's wife, Ms. Hardy Cole, filed a complaint for production of records naming Mr. Cebrun, Mr. Richards, and MCI. The summonses for Mr. Cebrun and Mr. Richards were directed to their home addresses while the summons for MCI was directed to its registered agent for process, Ms. Susan Short Jones, at her business address. Ms. Short Jones served on the Board of Governors of MCI, as the Secretary of MCI, as corporate counsel for MCMC, and she aided in the incorporation of MCI. Both the offices of AHS and MCMC were located at 210 Athens Way, Nashville, Tennessee, therefore, Mr. Cebrun, Mr. Richards and Ms. Short Jones all had offices at this location.

On February 11, 2002, Ms. Short Jones accepted service of process for Mr. Richards at 210 Athens Way by writing "Susan Short Jones for Walter Richards" on the return of summons. Deputy Sheriff Officer Gene Wilkerson also wrote "Served Susan Short Jones Attorney for Walter Richards" on the return of summons. On February 19, 2002, Deputy Sheriff Officer Robert Lillard executed the return of process on the summons for Mr. Cebrun at 210 Athens Way by writing "Served - Tony Cebru[n]." Ms. Short Jones also acknowledged service of the summons by signing her name to the return of summons. On April 10, 2002, Deputy Sheriff John Smith served Ms. Short Jones with the summons for MCI writing "Served Susan Short Jones" on the return of summons.

On March 14, 2002, Plaintiffs filed a motion for default against Mr. Richards and a notice for his deposition. A copy of the motion, notice and agreed order scheduling Mr. Richards' deposition were mailed to Mr. Cebrun at his home address. On March 27, 2002, Plaintiffs filed a motion for default against Mr. Cebrun, a copy of which was mailed to his home address. After taking the deposition of Mr. Richards, Plaintiffs voluntarily dismissed Mr. Richards and MCI and amended their complaint to assert a claim against Mr. Cebrun for compensatory and punitive damages and prejudgment interest. Copies of the motion, proposed amended complaint, order granting the amendment and amended complaint were sent to Mr. Cebrun's home address.

On July 22, 2003, Plaintiffs filed a motion for default judgment against Mr. Cebrun seeking a judgment in the amount of $680,000 for each Plaintiff. The motion stated that a hearing would be held on August 8, 2003, and gave notice that it would be granted without hearing pursuant to Local Rule 26.04 if no response was filed before 5:00 pm on August 8, 2003. Copies of the motion and a default judgment certificate were sent to Mr. Cebrun's home address. Having no response from Mr. Cebrun, on August 11, 2003, Plaintiffs tendered a proposed order granting their motion for default judgment. A copy of the proposed order was mailed to Mr. Cebrun's home address. On August 21, 2003, Plaintiffs tendered another proposed order granting default judgment which requested notice of entry. Chancellor Kilcrease did not enter either of the proposed orders granting the default judgment.

On July 29, 2004, Chancellor Bonnyman entered a case management order setting a hearing date. The order was mailed to Mr. Cebrun's home address. The hearing took place on October 11, 2004, before Chancellor Bonnyman where Plaintiffs presented affidavits and exhibits. On October 13, 2004, Plaintiffs submitted a proposed order granting default judgment in the amount of

$472,874.00 in favor of each Plaintiff. The proposed order was mailed to Mr. Cebrun's home address. On October 19, 2004, Chancellor Bonnyman entered an order granting default judgment.

Plaintiffs filed two motions to amend the order granting default judgment, once because the order incorrectly stated that Mr. Cebrun resided in Belle Meade and another because it misspelled Mr. Cebrun's name. Both of the motions were mailed to Mr. Cebrun's home address. On November 12, 2004, Plaintiffs filed a petition for attachment and injunction against the real property of Mr. Cebrun, which was located at 813 Russell Street in Nashville, Tennessee. A copy of the petition, Dr. Eluhu's affidavit, and the notice of hearing were hand-delivered to Mr. Cebrun's home address on Russell Street.

At the hearing for attachment and injunction on November 15, 2004, counsel appeared for the first time on behalf of Mr. Cebrun. However, based on the pleadings and all other matters before the court, Chancellor Bonnyman granted the attachment and restraining order. On November 19, 2004, Mr. Cebrun filed a motion to set aside the default judgment, asserting that he had not been properly served with process and that Ms. Short Jones was not authorized to accept service of process on his behalf. On November 24, 2004, Mr. Cebrun filed a motion to dissolve the attachment and injunction.

Chancellor Bonnyman conducted a hearing on Mr. Cebrun's motions on December 3, 2004. At the conclusion of the hearing, the court advised that oral testimony from disinterested parties was required to resolve the motion. On March 15, 2005, Chancellor Bonnyman conducted a hearing to determine if Ms. Short Jones was a disinterested witness and whether she was authorized to accept service on behalf of Mr. Cebrun. At the close of the hearing, Chancellor Bonnyman concluded that Mr. Cebrun was out of the country when several of the entities he ran were being sued, Ms. Short Jones was vested with the authority to handle Mr. Cebrun's personal affairs as long as they were associated with his businesses and that Mr. Cebrun failed to carry his burden to show that service of process was ineffective. On March 22, 2005, the court entered an order denying Mr. Cebrun's motion to set aside the default judgment. Mr. Cebrun appealed.

A trial court's entry of a default judgment and its refusal to set aside that judgment pursuant to a Tennessee Rule of Civil Procedure 60.02 motion is reviewed under an abuse of discretion standard. *Day v. Day*, 931 S.W.2d. 936, 939 (Tenn.Ct.App.1996). Thus, a trial court's judgment will be upheld so long as reasonable minds can disagree as to the correctness of the decision rendered. *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694,709 (Tenn.Ct.App.1999). A trial court only abuses its discretion when it applies an incorrect legal standard, reaches a decision which is clearly illogical or causes an injustice to the complaining party. *State v. Shuck*, 953 S.W.2d 622, 669 (Tenn.1997). However, due to the interests of justice, courts have expressed a clear preference for a trial on the merits, *Tenn. Dep't of Human Servs. v. Barbee*, 689 S.W.2d 863, 866 (Tenn.1985), therefore if there is reasonable doubt as to whether a default judgment should be set aside, a court should exercise its discretion in favor of granting relief. *Henry v. Goins*, 104 S.W.3d 475, 481 (Tenn.2003); *March v. Levine*, 115 S.W.3d 892, 913 (Tenn.Ct.App.2003).

The sole issue Mr. Cebrun presents on appeal is whether the trial court erred in dismissing his motion to set aside the default judgment because he was not properly served with process. Mr. Cebrun claims that the presumptive validity of the officer's return on the summons is overcome by (1) Plaintiffs' failure to prove that he evaded service; (2) Plaintiffs' failure to prove that Ms. Short Jones was an authorized agent for service of process; and (3) the fact that Mr. Cebrun possessed a meritorious defense.

"A judgment against a defendant who is not before the court either by proper service of process or by the entry of an appearance is void." *In re K.A.S.*, No. M2004-02180-COA-R9-CV, 2005 WL 195110, at *3 (Tenn.Ct.App. Jan 27, 2005). The requirements for proper service of process are set forth in Tennessee Rule of Civil Procedure 4.04, which provides in pertinent part:

> Service shall be made as follows:
> (1) Upon an individual other than an unmarried infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally, or if he or she evades or attempts to evade service, by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, whose name shall appear on the proof of service, or by delivering the copies to an agent authorized by appointment or by law to receive service on behalf of the individual served.

Tenn.R.Civ.P. 4.04(1).

Mr. Cebrun first argues that pursuant to Tennessee Rule of Civil Procedure 4.04(1), he must have attempted to evade service of process before Appellees could serve an agent authorized to accept service on his behalf and that the burden of proving such an evasion lies with Appellees. In *Haley v. Hitt Elec. Co.*, No. 01-A-01-9107-CH-00258, 1992 WL 7669, at *2 (Tenn.Ct.App. Jan. 22, 1992), the court established that "the only time any type of service other than personal service can be had upon an individual, including service upon an authorized agent, is if the individual 'evades or attempts to evade service or if he is an infant or incompetent.'" The burden of proving that an individual evaded or attempted to evade service of process is on the serving party. *Haley*, 1992 WL 7669, at *2.

Mr. Cebrun raises this argument for the first time on appeal. The issues presented in Mr. Cebrun's memorandum of law and facts in support of his motion to set aside the default judgment were limited to whether (1) service upon him was ineffective because he was served at his place of business rather than his abode; (2) service upon him was ineffective because Ms. Short Jones was not an authorized agent for service of process; (3) the judgment should be set aside because Plaintiffs took inconsistent positions in their pleadings; and (4) the judgment should be set aside because Mr. Cebrun could establish a meritorious defense. Although Mr. Cebrun stated in his memorandum that there had been no showing that he was evading service of process, this fact was raised in support of his argument that he should have been served at his abode rather than at his place of business. Until

this appeal, Mr. Cebrun never asserted that service through an agent was improper because he had not initially evaded service of process.

Accordingly, Plaintiffs never presented any evidence nor did the trial court make any factual findings as to whether Mr. Cebrun attempted to evade service of process. "It has long been the general rule that questions not raised in the trial court will not be entertained on appeal." *In re Adoption of E.N.R.*, 42 S.W.3d 26, 32 (Tenn.2001). Therefore, we find that this issue is waived on appeal. To hold otherwise would ambush Appellees with new issues on appeal without fair notice and more importantly, without the opportunity to fully develop the record with the pertinent facts.

Mr. Cebrun next argues that Appellees failed to prove that Ms. Short Jones was authorized to accept service of process on his behalf. We would first note that the burden for contesting proper service of process lies with Mr. Cebrun, not Appellees. "When disputing service of process, the burden is upon the party complaining of the service to show by clear and convincing proof that he or she was not served with process." *Braswell v. Graves*, No. M2004-00204-COA-R3-CV, 2004 WL 2609109, at *2 (Tenn.Ct.App. Nov. 17, 2004).

> The "clear and convincing evidence" standard defies precise definition. *Majors v. Smith*, 776 S.W.2d 538, 540 (Tenn.Ct.App.1989). While it is more exacting than the preponderance of the evidence standard, *Rentenbach Eng'g Co. v. General Realty Ltd.*, 707 S.W.2d 524, 527 (Tenn.Ct.App.1985), it does not require such certainty as the beyond a reasonable doubt standard. *Brandon v. Wright*, 838 S.W.2d 532, 536 (Tenn.Ct.App.1992). Clear and convincing evidence eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence. *See Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n. 3 (Tenn.1992). It should produce in the fact-finder's mind a firm belief or conviction with regard to the truth of the allegations sought to be established. *In re Estate of Armstrong*, 859 S.W.2d 323, 328 (Tenn.Ct.App.1993); *Wiltcher v. Bradley*, 708 S.W.2d 407, 411 (Tenn.Ct.App.1985).

Braswell, 2004 WL 2609109, at *2.

Based on the return of summons, it is unclear whether Mr. Cebrun was personally served or whether Ms. Short Jones accepted service on Mr. Cebrun's behalf. At the time of service, officer Lillard wrote: "Served - Tony Cebru[n]" on the return of summons. The return also contained the signature of Ms. Short Jones. These acts could be interpreted in one of two ways. First, officer Lillard could have personally served Mr. Cebrun and in such case, Ms. Short Jones' signature was mere surplusage. Alternatively, Ms. Short Jones' signature could indicate that she accepted service on behalf of Mr. Cebrun and that Mr. Cebrun was not present at the time of service. Unfortunately, the testimony of Ms. Short Jones at the hearing on March 15, 2005, does not aid the Court in this determination since Ms. Short Jones does not recall accepting service on behalf of Mr. Cebrun nor does she recall if he was present when she signed the summons.

However, we believe that the distinction is irrelevant in this case. It is well established that "[a]n officer's return is prima facie evidence of proper service of process." *Jackson v. Aldridge*, 6 S.W.3d 501, 503 (Tenn.Ct.App.1999). "This rule is based upon a presumption that public officials perform their duties in the manner prescribed by law." *Jackson*, 6 S.W.3d at 503. Since we accept officer Lillard's return as *prima facie* evidence of proper service of process, it was incumbent upon Mr. Cebrun to refute this presumption and to show by clear and convincing proof that he was not properly served with service of process either personally or through Ms. Short Jones. The affidavit submitted by Mr. Cebrun states in relevant part:

> 10. I was not served with a copy of the above styled numbered lawsuit and was not served with any summons regarding this lawsuit.
> 11. I was not evading the service of process in this lawsuit.
> 12. I am familiar with Susan Short Jones, as she served as General Counsel for Access Health Systems and Registered Agent for Medical Care Investors; while I served as Chief Executive Officer of Access Health System.
> 13. At no time have I ever instructed and or requested Susan Short Jones to accept service of process regarding this lawsuit and she has never represented me regarding this lawsuit.
> 14. I have always managed my affairs and Susan Short Jones does not manage my affairs and has never managed my affairs.

However, when a defendant denies that he was served with process and the official return as well as the testimony of the serving officer is to the contrary, then the testimony of the defendant must be supported by other disinterested witnesses or by corroborating circumstances. *Brake v. Kelly*, 226 S.W.2d 1008, 1011 (Tenn.1950); *see also Jackson*, 6 S.W.3d at 503. Clearly, Mr. Cebrun cannot serve as a disinterested witness in this matter, therefore we must rely on the testimony of the only other witness presented on Mr. Cebrun's behalf, Ms. Short Jones.

Before we determine whether Ms. Short Jones' testimony establishes by clear and convincing evidence that Mr. Cebrun was not properly served with process, we must decide whether Ms. Short Jones is a disinterested witness. Disinterested witness is defined as, "One who has no interest in the cause or matter in issue, and who is lawfully competent to testify. An impartial witness." *Black's Law Dictionary* 324 (6th ed. 1991). Although Ms. Short Jones indicated that she had an extensive business relationship with Mr. Cebrun dating back to the 1980's, we do not believe that such a relationship created an interest in the suit so as to disqualify Ms. Short Jones from being an impartial witness. Since the record reveals that Ms. Short Jones had no personal interest in the outcome of the case against Mr. Cebrun, we find that Ms. Short Jones could properly serve as a disinterested witness for Mr. Cebrun.

At the March 15, 2005, hearing Ms. Short Jones testified:

Q. Okay. Let's turn back for a minute to Mr. Cebrun's summons. When you signed your name to that summons, in what capacity were you signing your name?
A. I don't recall signing my name to this summons.
Q. Okay.
A. So I really can't say that I was signing in any capacity because I really don't recall this one.
...
Q. Now, the summons which I just handed you, that came from your file, correct?
A. That's correct.
Q. Do you know how you ended up with this summons?
A. I don't recall specifically how it came to be in my file but it was in the litigation file, my file involving this matter.
Q. Okay. And would Mr. Cebrun have handed you this summons?
A. I don't recall that Mr. Cebrun handed me the summons.
...
Q. And is that your signature that appears on the return of summons for Tony Cebrun, correct?
A. That is my signature.
Q. You have no idea where you were when you signed that summons, do you?
A. No.
Q. You don't know why you signed that return of summons, do you?
A. I don't have a recollection regarding the signature on the summons.
Q. You don't know what you did with that summons, do you?
A. No, I don't recall what I would have done with the summons. I don't recall the summons.
...
Q. Turning back to the acceptance of summons, were you authorized to accept summons on behalf of Mr. Cebrun?
A. Not that I recall.

Ms. Short Jones' inability to remember what transpired at the time Mr. Cebrun's summons was signed, including who was present, in what capacity she signed the summons, or how the summons ended up in her file, fails to prove by clear and convincing evidence that service was ineffective. It is inconsequential whether Mr. Cebrun was personally served or whether Ms. Short Jones was served as Mr. Cebrun's agent since Ms. Short Jones' testimony does not prove by clear and convincing evidence that either (1) Mr. Cebrun was not personally served; or (2) she was not an agent authorized to accept service on Mr. Cebrun's behalf. We therefore must find that Mr. Cebrun was properly served with process in this matter.

Mr. Cebrun's final argument is that the default judgment should be set aside because he possesses a meritorious defense. Tennessee Rule of Civil Procedure 55.02 provides that a court may

set aside a default judgment for good cause shown in accordance with Rule 60.02. Tennessee Rule of Civil Procedure 60.02 states in relevant part:

> On motion upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment.

"In deciding whether to grant a rule 60.02 motion to set aside the default judgment, courts consider three criteria: 1) whether the default was willful; 2) whether the defendant has asserted a meritorious defense; 3) the amount of prejudice which may result to the non-defaulting party." *Reynolds v. Battles*, 108 S.W.3d 249, 251 (Tenn.Ct.App.2003). It is the burden of the party seeking relief from a judgment to prove that he or she is entitled to relief. *State ex rel. Jones v. Looper*, 86 S.W.3d 189, 199 (Tenn.Ct.App.2000).

Although the meaning of willful depends on the context in which the word is used, *Zimberg v. United States*, 142 F.2d 132, 137 (1st Cir.1944), under Tennessee Rule of Civil Procedure 37, the courts have defined willfulness as "a conscious or intentional failure to act, as distinguished from accidental or involuntary noncompliance." *Sherick v. Jones*, No. 87-351-II, 1988 WL 55028, at *5 (Tenn.Ct.App.1998). In this case, the record clearly reflects that Mr. Cebrun willfully allowed the default judgment to be entered against him.

It is undisputed that every motion, notice, order, and amendment filed in this action, including the order granting default judgment, were mailed or hand-delivered to Mr. Cebrun's home address. Furthermore, at the hearing on March 15, 2005, Ms. Short Jones testified that not only did Mr. Cebrun have notice of the lawsuit filed by Plaintiffs but that she kept him informed about the status of the case.

> Q. Now, you advised Mr. Cebrun of the existence of this lawsuit, did you not?
> A. Yes.
> Q. And you provided him periodic updates about this lawsuit in casual conversation, did you not?
> A. Probably, yes.

Mr. Cebrun has never asserted that he was without knowledge of this lawsuit nor that he failed to receive the legal documents delivered to his home address.[1] Mr. Cebrun's sole contention is that he possesses a meritorious defense to Plaintiffs' claim and therefore he is entitled to have the default judgment set aside.

The purpose of a default judgment is to protect "a diligent party from continual delay and uncertainty as to his or her rights." *State ex rel. Jones*, 86 S.W.3d at 194. "[D]efendants are not allowed to prolong litigation by imposing procedural delays." *State ex rel. Jones*, 86 S.W.3d at 194. Although Rule 60.02 may act as an "escape valve from possible inequity" arising from the finality imbedded in our procedural rules, the Rule does not allow a litigant to simply "slumber" on his rights and then attempt to litigate issues "long since laid to rest." *Thompson v. Firemen's Fund Ins. Co.*, 798 S.W.2d 235, 238 (Tenn.1990).

Plaintiffs were diligent in pursuit of their cause of action against Mr. Cebrun, making every effort to involve him in the suit prior to the entry of default judgment. Mr. Cebrun willfully, consciously, and intentionally slept on his rights and therefore he is not entitled to invoke the procedural safeguard provided in Rule 60.02. Furthermore, we find it unnecessary to reach the merits of Mr. Cebrun's defense against Plaintiffs' claim because "[e]ven if a party has a potentially meritorious defense, a default judgment should not be vacated if that party has stood by idly, willfully and persistently, while the action proceeded to judgment." *Kent v. Fearless Realty, Inc.*, 571 N.Y.S.2d 276, 277 (N.Y.App.Div.1991). The judgment of the trial court is affirmed and costs of appeal are assessed against Appellant, Mr. Cebrun.

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WILLIAM B. CAIN, JUDGE

[1] We also believe that it is worth noting that Mr. Cebrun is not only a sophisticated businessman but that he possesses a law degree as well.